

**VIA ECFS**

***EX PARTE***

July 22, 2008

Ms. Marlene H. Dortch  
Secretary  
Federal Communications Commission  
445 12th Street, SW  
Washington, DC 20554

**Re:    *Petitions of Qwest Corporation for Forbearance Pursuant to 47 U.S.C. § 160(c) in the Denver, Minneapolis-St. Paul, Phoenix, and Seattle Metropolitan Statistical Areas, WC Docket No. 07-97***

Dear Ms. Dortch:

Cbeyond, Inc., Integra Telecom, Inc., One Communications Corp., and tw telecom inc. (collectively, the “Joint Commenters”), through their undersigned counsel, hereby respond to arguments made by Qwest in its July 1, 2008 *ex parte* letter,<sup>1</sup> by Verizon in its June 30, 2008 *ex parte* letter,<sup>2</sup> and by AT&T in its July 18, 2008 *ex parte* letter,<sup>3</sup> in the above-referenced docket regarding the extent to which the Commission should consider “cut-the-cord” mobile wireless households in its analysis of Qwest’s pending forbearance petitions.

As a threshold matter, it should be noted that, despite making countless *ex parte* submissions in this docket, Qwest has never addressed the Joint Commenters’ argument that

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<sup>1</sup> See Letter from Daphne E. Butler, Corporate Counsel, Qwest Corporation, to Marlene H. Dortch, Secretary, FCC, WC Dkt. No. 07-97 (filed July 1, 2008) (“*Qwest July 1st Ex Parte*”).

<sup>2</sup> See Letter from Rashann R. Duvall, Regulatory Counsel, Verizon Telephone Companies, to Marlene H. Dortch, Secretary, FCC, WC Dkt. No. 07-97 (filed June 30, 2008) (“*Verizon June 30th Ex Parte*”).

<sup>3</sup> See Letter from Christopher M. Heimann, General Attorney, AT&T Services Inc., to Marlene H. Dortch, Secretary, FCC, WC Dkt. No. 07-97 (filed July 18, 2008) (“*AT&T July 18th Ex Parte*”).

mobile wireless service does not belong in the same product market as wireline voice service, and therefore, should be excluded from the Commission's analysis of whether to grant petitions for forbearance from unbundling requirements.<sup>4</sup> Qwest also blithely ignores the Commission's recent finding in the *CETC Interim Cap Order* that "the majority of households do not view wireline and wireless services to be direct substitutes."<sup>5</sup> Moreover, while Qwest clings to the results of the latest CDC Survey<sup>6</sup> as evidence of "cut-the-cord" mobile wireless substitution that has contributed to the decline in its retail access line base,<sup>7</sup> Qwest ignores the fact that in the *CETC Interim Cap Order*, the Commission expressly rejected the use of a previous CDC Survey as evidence that mobile wireless service is a substitute for wireline voice service.<sup>8</sup>

Putting aside these omissions, the few arguments that Qwest makes in response to the arguments of the Joint Commenters and other competitors are flawed. *First*, Qwest objects to the competitors' recommendation that, if the Commission includes cut-the-cord mobile wireless

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<sup>4</sup> As explained by Dr. Kent Mikkelsen in this proceeding, application of the DOJ-FTC Merger Guidelines—generally used by the Commission to determine the scope of the relevant product market for its competition analysis—demonstrates that mobile wireless service does not belong in the same product market as wireline voice service. *See, e.g.*, Letter from T. Jones, Counsel, Cbeyond, Inc. et al., to Marlene H. Dortch, Secretary, FCC, WC Dkt. No. 07-97, at 2-4 (filed May 7, 2008) ("*Joint Commenters' May 7th Ex Parte*") (citing K. Mikkelsen, "Mobile Wireless 'Cut the Cord' Households in FCC Analysis of Wireline Competition," Apr. 21, 2008, WC Dkt. No. 07-97 (filed Apr. 22, 2008) ("Mikkelsen White Paper")).

<sup>5</sup> *See High-Cost Universal Service Support; Federal-State Joint Board on Universal Service*, Order, WC Dkt. No. 05-337, ¶ 21 (rel. May 1, 2008) ("*CETC Interim Cap Order*"). While Verizon argues in its *June 30th Ex Parte* that such a finding in the universal service context does not apply in the forbearance context, Verizon offers no explanation as to why this is the case. Indeed, no such explanation is available. As discussed in the *Joint Commenters' May 7th Ex Parte* (at 5), there is no basis for concluding that the mobile wireless services that wireless eligible telecommunications carriers offer are any different from those offered by mobile wireless providers in the Denver, Minneapolis, Phoenix or Seattle MSAs, or that the substitutability analysis would be any different in those MSAs than in high-cost areas. Accordingly, the Commission must apply the conclusions it reached in the *CETC Interim Cap Order* to the forbearance petitions at issue in the instant proceeding.

<sup>6</sup> Centers for Disease Control and Prevention, *Wireless Substitution: Early Release of Estimates From the National Health Interview Survey, July-December 2007* (rel. May 13, 2008), available at <http://www.cdc.gov/nchs/data/nhis/earlyrelease/wireless200805.pdf> ("CDC Survey").

<sup>7</sup> *See* Letter from Daphne E. Butler, Corporate Counsel, Qwest Corporation, to Marlene H. Dortch, Secretary, FCC, WC Dkt. No. 07-97, at 1-2 (filed May 15, 2008).

<sup>8</sup> In the *CETC Interim Cap Order* (n.63), the Commission held that the May 2007 CDC Survey's finding that nearly 13 percent of the population had the cut the cord as of December 2006 "fail[ed] to demonstrate that wireless ETCs are a complete substitute for wireline ETCs." *See also Joint Commenters' May 7th Ex Parte* at 5.

customers in its forbearance analysis, it should use the appropriate regional cut-the-cord estimate rather than the national estimate of 15.8 percent.<sup>9</sup> However, Qwest does not provide a logical explanation for why the cut-the-cord estimate for the Midwest region (10.6 percent) should not be used in an analysis of competition in the Minneapolis MSA, which is located in the “Midwest,” as that term is defined in the CDC Survey.<sup>10</sup> Nor does Qwest explain why the cut-the-cord estimate for the West region (13.7 percent) should not be used in an analysis of competition in the remaining three MSAs at issue, which are all located in the “West,” as that term is defined in the CDC Survey.<sup>11</sup> In fact, Qwest does not dispute the validity of the regional estimates in the CDC Survey. Instead, it asks the FCC to *ignore* these estimates by claiming that other factors, such as greater wireless-only behavior in metropolitan areas, *might* offset these estimates.<sup>12</sup> But even in the case of wireless-only behavior in urban areas, Qwest offers no evidence that the cities at issue here have cut-the-cord wireless substitution rates that are materially higher than the CDC estimates for the Midwest and West regions. In fact, Qwest has not offered any market-specific cut-the-cord information at all in this proceeding. It therefore has no basis for claiming that the CDC’s national estimate is any more reliable than the regional estimates in any particular market.

*Second*, Qwest objects to the competitors’ recommendation that the cut-the-cord estimate relied upon by the FCC, if any, should exclude college-age respondents to the CDC Survey.<sup>13</sup> Qwest suggests that the competitors have made this recommendation *because* of the prevalence of cut-the-cord behavior among the 18-24 year-old age group. This is wrong. Rather, college-age respondents should be excluded because, as explained by Joseph Gillan in this proceeding, they tend to exhibit purchasing patterns and behavioral choices that are not representative of the population as a whole.<sup>14</sup> Moreover, the purchasing decisions of respondents in the 18-24 year-old age group are often *temporary*. The CDC Survey itself indicates that the wireless-only status of these respondents diminishes as they mature.<sup>15</sup> Therefore, it would be improper to conclude, based on the temporary behavioral patterns of young adults, that mobile wireless service is a substitute for wireline voice service for a majority of households. Furthermore, the Commission

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<sup>9</sup> See *Qwest July 1st Ex Parte* at 2 (citing Letter from J.G. Harrington, Counsel, Cox Communications, Inc., to Marlene H. Dortch, Secretary, FCC, WC Dkt. No. 07-97, Attachment, at 2 (filed June 23, 2008)).

<sup>10</sup> See CDC Survey at 11-12.

<sup>11</sup> See *id.*

<sup>12</sup> See *Qwest July 1st Ex Parte* at 2.

<sup>13</sup> See *id.* at 3 (citing Letter from Genevieve Morelli, Kelley Drye & Warren LLP, to Marlene H. Dortch, Secretary, FCC, WC Dkt. No. 07-97 (filed June 25, 2008)).

<sup>14</sup> See Gillan Associates, “Properly Estimating the Size of the Wireless-Only Market,” March 2008, WC Dkt. No. 07-97, at 6-7 (filed Apr. 22, 2008) (“Gillan Study”).

<sup>15</sup> See CDC Survey at 7.

cannot safely assume that members of the 18-24 year-old age group, such as the hypothetical 21-year-old described in the *Qwest July 1st Ex Parte* (at 3), have actually “cut the cord” because, as explained in the Gillan Study (at 7), “it is not clear whether such respondents would have subscribed to wireline service had they not had access to a wireless phone.”

*Third*, Qwest asserts that “there is no rational basis” for the Commission to use the lower bound of the 95 percent confidence interval, rather than the percentage estimate provided by the CDC, if it decides to include mobile wireless substitution in its forbearance analysis.<sup>16</sup> On the contrary, by relying on the lower bound of the 95 percent confidence interval, the FCC will minimize the potential risk of prematurely granting forbearance based on an inflated estimate of the actual number of cut-the-cord mobile wireless subscribers.<sup>17</sup> As explained in the Gillan Study, “[b]y relying on the lower bound of the interval estimate, the Commission can be highly confident that the actual level of wireless-only lines is at or above the value used in its analysis, while limiting any risk that it might reach differing conclusions regarding wireless-only penetration merely because two point estimates from different samples both fall within the same confidence interval.”<sup>18</sup>

*Fourth*, Qwest disputes the Joint Commenters’ argument that, if the FCC defines the wireline voice product market to include mobile wireless service (which it should not), then the Commission must exclude cut-the-cord mobile wireless customers of all ILEC-affiliated wireless carriers from its calculation of competitors’ market share in the four MSAs for which Qwest seeks forbearance.<sup>19</sup> Qwest acknowledges that, because the FCC excluded in-region Verizon Wireless cut-the-cord customers from its calculation of competitors’ market share in the *6-MSA Order*,<sup>20</sup> the Commission must similarly exclude in-region Qwest Wireless cut-the-cord customers from its calculation of competitors’ market share in each of the MSAs at issue in the instant proceeding.<sup>21</sup> Qwest completely disregards, however, the FCC’s *rationale* for excluding Verizon Wireless’ subscribers from competitors’ market share in the *6-MSA Order*. The FCC attributed Verizon Wireless’ share of cut-the-cord customers to Verizon based on the express rationale that *ILEC-affiliated carriers would have an incentive to protect their affiliates’ wireline*

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<sup>16</sup> *Qwest July 1st Ex Parte* at 3.

<sup>17</sup> See Gillan Study at 6.

<sup>18</sup> *Id.*

<sup>19</sup> See *Qwest July 1st Ex Parte* at 3-4.

<sup>20</sup> See *Petitions of the Verizon Telephone Companies for Forbearance Pursuant to 47 U.S.C. § 160(c) in the Boston, New York, Philadelphia, Pittsburgh, Providence and Virginia Beach Metropolitan Statistical Areas*, Memorandum Opinion and Order, 22 FCC Rcd. 21293, App. B. n.6 (2007) (“*6-MSA Order*”).

<sup>21</sup> *Id.* n.7.

*customer bases from intermodal competition.*<sup>22</sup> That is, the FCC excluded in-region cut-the-cord mobile wireless customers of the ILEC-affiliated wireless carrier in the markets for which the petitioner sought forbearance *because that ILEC-affiliated wireless carrier had an incentive to prevent its affiliate's landline customers from cutting the cord.* The logical extension of this reasoning is that, where ILEC-affiliated carriers generally price and market their services in the same way out-of-region as in-region, the FCC must also exclude the cut-the-cord mobile wireless customers of the other ILEC-affiliated wireless carriers operating in Qwest's region from its calculation of competitors' market share.

Qwest points to two wireless plans offered by AT&T Mobility and Verizon Wireless, apparently as evidence that these ILEC-affiliated wireless carriers price and market some of their services differently in-region than out-of-region.<sup>23</sup> Yet both AT&T and Verizon candidly acknowledge that their mobile wireless affiliates offer service pursuant to the same prices, terms and conditions nationwide.<sup>24</sup> In any case, the two offerings cited by Qwest do not show that ILEC-affiliated wireless carriers are more aggressively seeking to prevent landline customers from cutting the cord in-region than out-of-region. The terms and conditions of AT&T's \$50 cash back offer<sup>25</sup> require that the AT&T customer retain her wireless service for 30 days in order to receive the cash back reward, but there is no express requirement that the subscriber retain her landline service for any period of time in order to receive the reward.<sup>26</sup> Moreover, the customer receives the \$50 cash back on AT&T's mobile wireless service, not AT&T's landline service.<sup>27</sup> Similarly, Verizon's home and wireless phone bundle<sup>28</sup>—which includes free airtime for calls from the subscriber's wireless phone to his home phone—offers customers a discount on mobile wireless service, not Verizon landline service. If these offers were designed to prevent in-region customers from cutting the cord, they would offer discounts on the *wireline* service, *not* on the *wireless* service. The fact that these offers include a discount on the wireless service shows that, if anything, they are efforts by the ILECs to leverage their market power in the wireline voice market by providing incentives to encourage existing wireline customers *to add* mobile wireless service, *not to prevent* existing wireline customers from cutting the cord. Thus, it is irrelevant

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<sup>22</sup> See Letter from Thomas Jones, Counsel, Cbeyond, Inc. et al., to Marlene H. Dortch, Secretary, FCC, WC Dkt. No. 07-97, at 2 (filed June 26, 2008) (citing *6-MSA Order*, App. B, n.6).

<sup>23</sup> See *Qwest July 1st Ex Parte* at 4.

<sup>24</sup> *Verizon June 30th Ex Parte* (stating that “wireless providers increasingly set their prices on a national basis”); *AT&T July 18th Ex Parte* at 5 (citing with agreement the Joint Commenters’ assertion that “nationwide [mobile wireless] providers price and market their wireless services the same way in-region and out-of-region”).

<sup>25</sup> See *Qwest July 1st Ex Parte* at 4.

<sup>26</sup> See AT&T - Terms and Conditions, <http://www.att.com/gen/general?pid=7690> (last visited July 21, 2008).

<sup>27</sup> See *id.*

<sup>28</sup> See *Qwest July 1st Ex Parte* at 4.

that these offers “are not available to Qwest wireline customers, and thus, do not prevent cannibalization of Qwest lines.”<sup>29</sup>

The point, rather, is that most customers of ILEC-affiliated wireless carriers subscribe to the same plans, whether in-region or out-of-region, and therefore, following the FCC’s logic in the *6-MSA Order*, the FCC must exclude the cut-the-cord customers of all ILEC-affiliated wireless carriers in its market share calculations for the Denver, Minneapolis, Phoenix, and Seattle MSAs. Qwest instead mischaracterizes the Joint Commenters’ argument by claiming that “the Joint CLECs would have the Commission act as if Qwest is not losing any access lines to either Verizon Wireless or AT&T Mobility,”<sup>30</sup> and that the Joint Commenters “suggest that Qwest’s customers are not attracted to either Verizon’s or AT&T’s wireless service.”<sup>31</sup> These are red herrings. The FCC itself acknowledged in the *6-MSA Order* that customers in the markets at issue had cut the wireline cord in favor of Verizon Wireless. It nevertheless decided not to count those customers in competitors’ market share because of Verizon Wireless’ incentives to prevent existing Verizon customers from cutting the cord. The Joint Commenters simply urge the Commission to follow that finding to its logical conclusion. In light of Verizon Wireless’ and other ILEC-affiliated wireless carriers’ national pricing and marketing, that conclusion is that ILEC-affiliated wireless carriers seek to prevent their affiliates’ wireline customers from cutting the cord out-of-region just as much as they do in-region. Thus, if ILEC-affiliated customers are excluded from competitors’ market share in-region, they must be excluded from competitors’ market share out-of-region.

Unlike Qwest, neither Verizon nor AT&T even attempts to respond to this argument. Instead, Verizon dismisses the Joint Commenters’ argument that the cut-the-cord customers of all ILEC-affiliated wireless carriers must be excluded from the FCC’s calculation of competitors’ market share on the ground that “the market for wireless services is ‘highly competitive.’”<sup>32</sup> AT&T makes essentially the same argument.<sup>33</sup> But this was equally true in the six MSAs for which the FCC excluded Verizon Wireless’ cut-the-cord customers from competitors’ market share. Thus, the competitiveness of the wireless market is irrelevant.

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<sup>29</sup> *See id.*

<sup>30</sup> *See id.* at 3 (emphasis in original).

<sup>31</sup> *See id.* at 4.

<sup>32</sup> *Id.* at 4 (internal citation omitted).

<sup>33</sup> *See AT&T July 18th Ex Parte* at 5-6. AT&T only adds the further point that the Joint Commenters have failed to support “their claim that wireline-affiliated wireless providers design and market their wireless services so as to protect their landline business.” *See id.* at 5. But this is not the Joint Commenters’ “claim.” It is the FCC’s own finding. The Joint Commenters’ only “claim” is that the FCC must apply that finding in a consistent and rational way. In any event, it is far too late in this 15-month proceeding for AT&T to be attempting to rebut the FCC’s finding.

Finally, in its *June 30th Ex Parte* (n.14), Verizon attempts to backtrack from the survey results it published in May 2008 in which 83 percent of respondents reported that they “intend[ed] to continue using their landline home phone indefinitely.”<sup>34</sup> Verizon claims that the “survey involved only existing landline subscribers [at least 74 percent of whom also subscribed to mobile phone service], and not subscribers who have *already* decided to cut the cord.”<sup>35</sup> This argument fails, however, because as Dr. Mikkelsen has explained, the relevant inquiry is whether a hypothetical monopolist could increase prices paid by *existing* wireline customers.<sup>36</sup>

Respectfully submitted,

/s/ Thomas Jones

Thomas Jones

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tw telecom inc.*

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<sup>34</sup> See *Joint Commenters' May 7th Ex Parte* at 6 & n.16 (citing Press Release, “Verizon, New Survey Shows 83 Percent of Consumers Continue to Rely on Landline Voice Service for Its Quality, Safety Features” (Mar. 27, 2008), <http://newscenter.verizon.com/press-releases/verizon/2008/new-survey-shows-83-percent-of.html> (last visited July 22, 2008)).

<sup>35</sup> *Verizon June 30th Ex Parte* n.14 (internal citation omitted) (emphasis in original).

<sup>36</sup> See Mikkelsen White Paper at 3 (whether a hypothetical monopolist could profitably impose a small but significant and nontransitory increase in price “depends on how current purchasers of wireline voice services would respond to such a price increase”).